

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANTHONY MICHAEL MILANO,

Case No.: 3:17-cv-00403-RCJ-WGC

Plaintiff

Report & Recommendation of United States Magistrate Judge

V.

Re: ECF No. 32

MARIAFE VITAL,

Defendant

This Report and Recommendation is made to the Honorable Robert C. Jones, United District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Before the court is Defendant's Motion for Summary Judgment. (ECF Nos. 32, 32-1 to
13 32-3, 34, 34-1 to 34-6.) Plaintiff filed a response. (ECF No. 37.) Defendant filed a reply. (ECF
14 No. 38.) Plaintiff filed a sur-reply. (ECF No. 39.)¹

After a thorough review, it is recommended that Defendant's motion be granted.

I. BACKGROUND

Plaintiff was an inmate in the custody of the Nevada Department of Corrections (NDOC), proceeding pro se when he filed this action pursuant to 42 U.S.C. § 1983. At the time the court screened the complaint, he was no longer incarcerated. The events giving rise to this action took

²² Under the Local Rules, a motion, response, and reply brief are permitted. A sur-reply, which is
²³ a response to a reply, is not permitted without leave of court, and is generally discouraged. LR 7-
2(b). Defendant did not move to strike the sur-reply, and given its brevity, the court has
exercised its discretion and considered it in connection with its analysis. In the future, Plaintiff is
cautioned to seek leave of court before filing a sur-reply.

1 place while Plaintiff was housed at High Desert State Prison (HDSP). (*Id.*) The sole defendant is
2 former HDSP Nurse Mariafe Vital.

3 On screening, Plaintiff was allowed to proceed with a single Eighth Amendment claim of
4 deliberate indifference to a serious medical need. (ECF No. 5.) The defendant was initially
5 named as Jane Doe, and subsequently identified and substituted as Mariafe Vital. (ECF Nos. 8,
6 9.)

7 Plaintiff alleges that he entered the custody of NDOC at HDSP on July 2, 2015, and that
8 same day, he called a "man down" because he started vomiting, experienced vertigo and double
9 vision, and was unable to control his bowel movements. He avers that prison officials admitted
10 him to the infirmary. On July 20, 2015, he was sent to Valley Hospital and was diagnosed with
11 multiple sclerosis (MS). Then, from October 2015 to November 2015, Plaintiff again started
12 vomiting, experiencing vertigo and double vision, and was unable to control his bowel
13 movements. He had to wait 45 days before seeing a neurologist who provided MS treatment.
14 After the treatment, his symptoms subsided. He avers that during that time period, he put
15 Defendant on notice he was suffering from these symptoms via formal and informal means of
16 communication, including emergency grievance forms, medical kites, and verbally. He contends
17 that Defendant failed to provide him with any treatment and told Plaintiff there was nothing she
18 could do. He alleges that he suffered from unnecessary infliction of pain due to her failure to
19 provide him with any treatment.

20 Defendant moves for summary judgment, arguing: (1) Plaintiff's Eighth Amendment
21 rights were not violated as he received appropriate treatment after arriving at HDSP;
22 (2) Defendant did not personally participate in the alleged constitutional violation as there is no
23 evidence she denied Plaintiff medical care in any way, but requested a neurology appointment

1 for Plaintiff as soon as he returned from the hospital with the MS diagnosis; and (3) Defendant is
 2 entitled to qualified immunity.

3 **II. LEGAL STANDARD**

4 The legal standard governing this motion is well settled: a party is entitled to summary
 5 judgment when "the movant shows that there is no genuine issue as to any material fact and the
 6 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*
 7 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if the
 8 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*
 9 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is "material" if it could affect the outcome
 10 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary
 11 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the
 12 other hand, where reasonable minds could differ on the material facts at issue, summary
 13 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

14 "The purpose of summary judgment is to avoid unnecessary trials when there is no
 15 dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
 16 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose
 17 of summary judgment is "to isolate and dispose of factually unsupported claims"); *Anderson*, 477
 18 U.S. at 252 (purpose of summary judgment is to determine whether a case "is so one-sided that
 19 one party must prevail as a matter of law"). In considering a motion for summary judgment, all
 20 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*
 21 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*
 22 & *Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, "if the evidence of the
 23 nonmoving party "is not significantly probative, summary judgment may be granted." *Anderson*,

1 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and
 2 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
 3 *Anderson*, 477 U.S. at 249.

4 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
 5 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must
 6 come forward with evidence which would entitle it to a directed verdict if the evidence went
 7 uncontested at trial.’ ... In such a case, the moving party has the initial burden of establishing
 8 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*
 9 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
 10 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
 11 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
 12 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
 13 party cannot establish an element essential to that party’s case on which that party will have the
 14 burden of proof at trial. See *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

15 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
 16 establish that a genuine dispute exists as to a material fact. See *Matsushita Elec. Indus. Co. v.*
 17 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
 18 dispute of material fact conclusively in its favor. It is sufficient that “the claimed factual dispute
 19 be shown to require a jury or judge to resolve the parties’ differing versions of truth at trial.”
 20 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)
 21 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
 22 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475
 23 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the

1 pleadings and set forth specific facts by producing competent evidence that shows a genuine
2 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

3 **III. DISCUSSION**

4 **A. Facts**

5 Plaintiff began serving his sentence at HDSP on July 1, 2015, and was discharged and
6 released on November 25, 2017. (ECF No. 32-3 at 2.)

7 July 1, 2015, was Plaintiff's first day in prison at HDSP. There is a medical report of
8 incident, injury or unusual occurrence from that date, indicating a "man down" was called, and
9 Plaintiff reported he had been throwing up for four weeks. He was sent to the infirmary to be
10 referred to Dr. Sanchez (not a defendant in this action). The document is signed by N. Peret, CN
11 II. (ECF No. 34-1.) He was admitted to the infirmary, and it appears Dr. Sanchez prescribed
12 Omeprazole (an acid reflux medication), Levothyroxine (a thyroid medication), Mylanta (an
13 antacid), and Phenergan (an anti-nausea medication), and labs were ordered. (ECF No. 34-2 at
14 2.) He was monitored, given fluids, medications adjusted, and had more labs through July 20,
15 2015, when it was ordered that he be sent to the emergency room for persistent vomiting with
16 double vision and an inability to ambulate due to these problems. (ECF No. 34-2 at 2-4; ECF No.
17 34-3 at 6-10; ECF No. 34-6 at 3-8.)

18 He was hospitalized from July 20 to August 5, 2015, and during that time he was
19 diagnosed with MS. (ECF No. 34-3 at 10; ECF No. 34-5.)

20 On August 5, 2015, he was sent back to HDSP, where he was admitted to the infirmary
21 and given various medications. (ECF No. 34-2 at 4; ECF No. 34-3 at 10.) On August 6, 2015,
22 following his return to HDSP, there is an order that he be referred to the "URC" (Utilization
23 Review Committee) for a neurology consultation with Dr. Paul Janda per Valley Hospital's

1 recommendation for the diagnosis of MS. (ECF No. 34-2 at 5; ECF No. 34-3 at 10; ECF No. 34-
2 5 at 2.)

3 Plaintiff continued to be monitored in the infirmary, with his medications renewed and
4 adjusted, and labs ordered and reviewed. (ECF No. 34-2 at 5-8; ECF No. 34-3 at 10-15.) On
5 October 10, 2015, there was a note that Plaintiff was concerned he had not seen the neurologist
6 and wrote a grievance. The progress notes state there was an appointment scheduled, but they
7 could not tell him when it was scheduled. (ECF No. 34-3 at 12.) There is an order on October 12,
8 2015, to follow up regarding the neurology appointment. (ECF No. 34-2 at 7.) He was
9 discharged from the infirmary on November 3, 2015, but continued to be monitored as to his
10 condition and medications. (ECF No. 34-2 at 9; ECF No. 34-3 at 10-15; ECF No. 34-6 at 9-23.)

11 While awaiting his neurology appointment, he was given anti-nausea, antacid, thyroid
12 and painkiller medications to control his symptoms. He was continually monitored and his
13 medications were adjusted. On November 20, 2015, he had the neurology appointment with
14 Dr. Janda. At that time, he complained to the neurologist of limb paresthesias and gait
15 impairment at times, but denied any other focal symptomology and also denied any visual
16 symptomology. Dr. Janda's plan was to start him on Copaxone and Vitamin D daily; an MRI of
17 the brain and CT of the spine were to be repeated in June of 2016; VEP/SSEP/BAER testing²
18 was to be done at the clinic; a metabolic workup was to be done; and, Plaintiff was to maintain
19 lifestyle modifications that were discussed at the visit. (ECF No. 34-5 at 5-6.)

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² The literature included in the medical records indicates that this involves: somatosensory testing to evaluate nerve pathway from the peripheral nerve through the spine to the somatosensory region of the brain; visual testing checking the nerves that go from the eye to visual cortex; and, brainstem testing of the ear and brain for auditory and brainstem disorders.

1 **B. Eighth Amendment Deliberate Indifference Standard**

2 A prisoner can establish an Eighth Amendment violation arising from deficient medical
 3 care if he can prove that prison officials were deliberately indifferent to a serious medical need.
 4 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A claim for deliberate indifference involves the
 5 examination of two elements: "the seriousness of the prisoner's medical need and the nature of
 6 the defendant's response to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992),
 7 *rev'd on other grounds*, *WMX Tech, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997); *see also*
 8 *Akhtar v. Mesa*, 698 F.3d 1202, 1213 (9th Cir. 2012) (quoting *Jett v. Penner*, 439 F.3d 1091,
 9 1096 (9th Cir. 2006)). "A 'serious' medical need exists if the failure to treat a prisoner's condition
 10 could result in further significant injury or the 'unnecessary and wanton infliction of pain.'"
 11 *McGuckin*, 974 F.2d at 1059 (citing *Estelle*, 429 U.S. at 104); *see also* *Akhtar*, 698 F.3d at 1213.
 12 Examples of conditions that are "serious" in nature include "an injury that a reasonable doctor or
 13 patient would find important and worthy of comment or treatment; the presence of a medical
 14 condition that significantly affects an individual's daily activities; or the existence of chronic and
 15 substantial pain." *McGuckin*, 974 F.2d at 1059-60; *see also* *Lopez v. Smith*, 203 F.3d 1122, 1131
 16 (9th Cir. 2000) (citation omitted) (finding that inmate whose jaw was broken and mouth was
 17 wired shut for several months demonstrated a serious medical need).

18 Defendants do not contest that Plaintiff suffered from a serious medical need; therefore,
 19 the court's focus is on the subjective criteria: deliberate indifference. If the medical need is
 20 "serious," the plaintiff must show that the defendant acted with deliberate indifference to that
 21 need. *Estelle*, 429 U.S. at 104; *Akhtar*, 698 F.3d at 1213 (citation omitted). "Deliberate
 22 indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).
 23 Deliberate indifference entails something more than medical malpractice or even gross

1 negligence. *Id.* Inadvertence, by itself, is insufficient to establish a cause of action under section
 2 1983. *McGuckin*, 974 F.2d at 1060. Instead, deliberate indifference is only present when a prison
 3 official "knows of and disregards an excessive risk to inmate health or safety; the official must
 4 both be aware of the facts from which the inference could be drawn that a substantial risk of
 5 serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837
 6 (1994); *see also Akhtar*, 698 F.3d at 1213 (citation omitted).

7 Deliberate indifference exists when a prison official "den[ies], delay[s] or intentionally
 8 interfere[s] with medical treatment, or it may be shown by the way in which prison officials
 9 provide medical care." *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013) (internal
 10 quotation marks and citation omitted). "[A] prisoner need not prove that he was completely
 11 denied medical care' in order to prevail" on a claim of deliberate indifference. *Snow v. McDaniel*,
 12 681 F.3d 978, 987 (9th Cir. 2012) (quoting *Lopez*, 203 F.3d at 1132), *overruled on other*
 13 *grounds*, *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014). Where delay in receiving medical
 14 treatment is alleged, a prisoner must demonstrate that the delay led to further injury. *McGuckin*,
 15 974 F.2d at 1060.

16 "A difference of opinion between a physician and the prisoner—or between medical
 17 professionals—concerning what medical care is appropriate does not amount to deliberate
 18 indifference." *Snow*, 681 F.3d at 987 (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)).
 19 Instead, to establish deliberate indifference in the context of a difference of opinion between a
 20 physician and the prisoner or between medical providers, the prisoner "must show that the
 21 course of treatment the doctors chose was medically unacceptable under the circumstances' and
 22 that the defendants 'chose this course in conscious disregard of an excessive risk to plaintiff's

1 health.'" *Snow*, 681 F.3d at 988 (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996));
 2 *see also Edmo v. Corizon*, 935 F.3d 757, 786 (9th Cir. Aug. 2019) (citations omitted).

3 **C. Analysis**

4 Plaintiff alleges he was denied treatment for 45 days from October through November
 5 2015, before his neurology appointment.

6 Defendant argues that the medical records reveal he received numerous medications to
 7 control his symptoms during that time period, as well as medical visits to monitor his condition,
 8 adjustment his medications and respond to his complaints. Defendant contends that in August
 9 2015, she immediately referred Plaintiff to a neurologist after his MS diagnosis. Therefore, she
 10 did not deny Plaintiff treatment.

11 Plaintiff confirms that he is alleging that Defendant denied him adequate medical care by
 12 refusing him any treatment *after* his diagnosis at Valley Hospital. He acknowledges that
 13 Defendant did request the neurology appointment upon his return from Valley Hospital. He also
 14 acknowledges receiving various medications, but claims they did not work. He states that he
 15 talked with Defendant and explained he was having a "second attack from MS" and she told him
 16 "there's nothing I can do for you until you see a neurologist."

17 While Plaintiff claims that Defendant said there was nothing she could do for him until
 18 he saw a neurologist, he offers no factual context for this statement, i.e. when it was made, what
 19 he told Defendant about his condition, or what symptoms he was experiencing and whether he
 20 advised her what he claimed was not being addressed. Further, the medical evidence before the
 21 court demonstrates that Plaintiff did continue to receive care while he was waiting for his
 22 neurology appointment: he received various medications, labs were ordered, he had visits with
 23 providers and nurses where his symptoms were noted and addressed, and there were follow up

1 inquiries as to the appointment with the neurologist. While Plaintiff contends that the
2 medications he received were not working, he does not present any specific evidence that he
3 notified Defendant of this and that she failed to do anything. He does not suggest what care
4 Defendant should have provided but did not. His complaint alleges that he put her on notice of
5 his symptoms via emergency grievances, kites and verbal communications, but he does not
6 submit or describe any of these alleged written or verbal statements he claims to have made to
7 Defendant. Instead, the evidence demonstrates that Plaintiff continued to be monitored and
8 provided with care until he could be seen by the neurologist.

9 Defendant has presented evidence that she provided Plaintiff with adequate medical
10 treatment between the time he returned from Valley Hospital on August 5, 2015, and when he
11 saw the neurologist in mid-November such that she was not deliberately indifferent to Plaintiff's
12 medical needs. Plaintiff has not met his burden of submitting evidence that creates a genuine
13 dispute of material fact as to whether Defendant was deliberately indifferent. He relies on a
14 single conclusory statement attributed to the Defendant, without any specific factual references,
15 which is insufficient to defeat a motion for summary judgment. In light of this conclusion, the
16 court need not reach Defendant's qualified immunity argument.

17 In conclusion, summary judgment should be granted in Defendant's favor.

IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order **GRANTING**
Defendant's motion for summary judgment.

21 The parties should be aware of the following:

22 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
23 this Report and Recommendation within fourteen days of being served with a copy of the Report

1 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
2 Report and Recommendation” and should be accompanied by points and authorities for
3 consideration by the district judge.

4 2. That this Report and Recommendation is not an appealable order and that any notice of
5 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
6 until entry of judgment by the district court.

8 | Dated: October 8, 2019

William G. Cobb